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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 MICHAEL DENTON,

12 Plaintiff,

13 v.

14 LT. CHARLA JAMES-HUTCHISON,
15 SGT. JACKIE CARUSO,

16 Defendants.

CASE NO. 16-5314 RJB

ORDER DENYING PLAINTIFF'S
MOTION TO ALLOW MICHELLE
WALKER TO TESTIFY AT TRIAL
AND OTHER MOTIONS

17 THIS MATTER comes before the Court on Plaintiff's Motion to Allow Disciplinary
18 Hearings Program Administrator Michelle Walker to Testify at Trial (Dkt. 215), Plaintiff's
19 Motion to Request that the Defendants Appear by Video Teleconference for Trial (Dkt. 214), and
20 Plaintiff's motion for appointment of counsel (Dkt. 214). The Court has considered the
21 pleadings filed regarding the motions and the remaining record.

22 On April 28, 2016, Plaintiff, a prisoner acting *pro se*, filed this case pursuant to 42 U.S.C.
23 § 1983. Dkts. 1 and 4. This case is set to begin trial on October 29, 2018 on the Plaintiff's claim
24 that, while he was a pre-trial detainee in the Pierce County, Washington jail, Defendants

1 Lieutenant Charla James-Hutchinson and Sergeant Jackie Caruso violated his due process rights
2 when they revoked his good time credits. Dkt. 99.

3 **A. Plaintiff's Motion to Allow Disciplinary Hearings Program Administrator**
4 **Michelle Walker to Testify at Trial**

5 **Motion Regarding Ms. Walker:** In the current motion, Plaintiff moves the Court to
6 allow Washington State Penitentiary Disciplinary Hearings Program Manager Michelle Walker
7 to testify at the trial. Dkt. 215. Plaintiff's motion states what Plaintiff would like Ms. Walker's
8 testimony to be, including: what must be stated on disciplinary notice forms; the rights of
9 inmates at disciplinary hearings; that no DOC officer/employee can conduct a disciplinary except
10 a disciplinary hearings officer, all hearings must be audio taped; that the inmate must be asked at
11 the hearing, while the audio tape recorder is on, if he or she received the notice form, the basis
12 for the hearing, and whether he or she "requested any witnesses statements from any other
13 inmate or officer to be retrieved by the disciplinary officer and served on the inmate before the
14 hearing is conducted." *Id.*, at 2-3.

15 Defendants respond and oppose the motion. Dkt. 218. They assert that Ms. Walker's
16 testimony, and that of any other Washington Department of Corrections employee regarding its'
17 practices, procedures or policies should be excluded as irrelevant under Fed. Evid. R. 401,
18 inadmissible under Fed. Evid. R. 402, and otherwise excludable under Fed. Evid. R. 403. *Id.*

19 **Standard on Motion.** Fed. Evid. R. 401 provides, "evidence is relevant if: (a) it has any
20 tendency to make a fact more or less probable than it would be without the evidence; and (b) the
21 fact is of consequence in determining the action." Under Fed. R. Evid. R. 402, "irrelevant
22 evidence is not admissible." Further, "[t]he court may exclude relevant evidence if its probative
23 value is substantially outweighed by a danger of one or more of the following: unfair prejudice,
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1 confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting
2 cumulative evidence.” Fed. R. Evid. Rule 403.

3 **Decision on Motion.** Plaintiff’s motion (Dkt. 215) should be denied without prejudice.
4 At this stage, Plaintiff’s proffered evidence is not relevant. The Supreme Court has held that
5 where, as here, an inmate has a protected liberty interest in good time credits, due process
6 requires that, before and at the disciplinary hearing, the inmate “receive: (1) advance written
7 notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety
8 and correctional goals, to call witnesses and present documentary evidence in his defense; and
9 (3) a written statement by the factfinder of the evidence relied on and the reasons for the
10 disciplinary action.” *Superintendent, Massachusetts Correctional Institution, Wapole v. Hill*,
11 472 U.S. 445, 454 (2001)(*internal citation omitted*). In the Order Adopting the Report and
12 Recommendation, this Court held that the Defendants met the first and third requirements. Dkt.
13 166. There are issues of fact as to the second requirement only: whether Plaintiff was given an
14 opportunity to call witnesses. The Defendants assert that they gave him the opportunity and
15 Plaintiff maintains they did not. Ms. Walker’s testimony regarding the practices, policies and
16 procedures at the state Department of Corrections is not relevant to the issue whether the Pierce
17 County, Washington Jail employees did or did not give Plaintiff an opportunity to call witnesses.
18 At this point, Plaintiff has not made a showing that this evidence is relevant to the issues at trial,
19 and so should be excluded under Fed. Evid. R. 401 and 402.

20 Moreover, the testimony that Plaintiff seeks to elicit regarding the practices, policies, and
21 procedures at the state prisons would, at least in part, present cumulative evidence. The
22 Defendants acknowledge that they had to provide him notice of the charges and a statement of
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1 reasons after the hearing. Further testimony that they had those obligations would be
2 unnecessarily cumulative and should be excluded under Fed. Evid. R. 403.

3 The Plaintiff's Motion to Allow Disciplinary Hearings Program Administrator Michelle
4 Walker to Testify at Trial (Dkt. 215) should be denied without prejudice.

5 **B. Plaintiff's Motion to Request that the Defendants Appear by Video**
6 **Teleconference**

7 **Motion.** In this motion, Plaintiff seeks an order from the Court requiring that the
8 Defendants also appear by video teleconference at trial, arguing that forcing Plaintiff to appear
9 by video and not requiring the same of Defendants gives Defendants an unfair advantage. Dkt.
10 214.

11 Defendants oppose the motion and argue that they have done nothing to warrant being
12 required to appear by video. Dkt. 219. They maintain that to the extent Plaintiff moves the
13 Court to again reconsider the prior order denying him his Writ of Habeas Corpus Testificandum
14 (Dkt. 194), the motion should be denied. *Id.*

15 **Standard on Motion.** Generally, "parties in a civil trial have a right to be present in
16 person or by counsel at all proceedings from the time the jury is impaneled until it is discharged
17 after rendering the verdict." *Kulas v. Flores*, 255 F.3d 780, 786 (9th Cir. 2001)(*internal*
18 *quotation marks and citation omitted*). At times, "imprisonment suspends the plaintiff's usual
19 right to be personally present at judicial proceedings brought by himself or on his behalf."
20 *Hernandez v. Whiting*, 881 F.2d 768, 770 (9th Cir. 1989).

21 **Decision on Motion.** Plaintiff's Motion to Request that the Defendants Appear by Video
22 Teleconference at Trial (Dkt. 214) should be denied. There is no basis to require Defendants to
23 appear at trial via videoconference. They are not in custody, and Plaintiff points to no rational
24 basis to enter such an order. To the extent Plaintiff again moves for reconsideration of the May

1 30, 2018 Order denying his Writ of Habeas Corpus Ad Testificandum (Dkt. 194), his motion
2 should be denied. As stated in the prior order denying his motions for reconsideration on this
3 issue:

4 Under Local Rule W.D. Washington 7 (h)(2), a motion for reconsideration shall
5 be filed “within fourteen days after the order to which it relates.” Moreover,
6 “[m]otions for reconsideration are disfavored.” Local Rule 7 (h)(1). The rule
7 further provides that “[t]he court will ordinarily deny such motions in the absence
8 of a showing of manifest error in the prior ruling or a showing of new facts or
9 legal authority which could not have been brought to its attention earlier.” *Id.*

10 Dkt. 199. Plaintiff’s current motion for reconsideration (Dkt. 214) should be denied. It is
11 untimely – it was filed 43 days after the order was filed – 29 days too late. Further, Plaintiff fails
12 to make a “showing of manifest error in the prior ruling or a showing of new facts or legal
13 authority which could not have been brought to [the Court’s] attention earlier.” Local Rule 7
14 (h)(1).

15 **C. Plaintiff’s Motion for Appointment of Counsel**

16 **Motion.** If the motion requiring that the Defendants also appear by video teleconference
17 at trial is denied, Plaintiff moves for the appointment of counsel, again. Dkt. 214.

18 **Standard.** Normally, if a plaintiff has been granted *in forma pauperis* status, the court
19 may appoint counsel to represent him or her in exceptional circumstances. *Franklin v. Murphy*,
20 745 F.2d 1221, 1236 (9th Cir. 1984). To find exceptional circumstances, the court must evaluate
21 the likelihood of success on the merits and the ability of the petitioner to articulate the claims *pro*
22 *se* in light of the complexity of the legal issues involved. *Weygandt v. Look*, 718 F.2d 952, 954
23 (9th Cir. 1983).

24 **Decision on Motion for Appointment of Counsel.** Plaintiff’s motion for appointment
of counsel (Dkt. 214) should be denied. As was true in his prior motion for appointment of
counsel (Dkts. 198), there is no showing of an exceptional circumstance here. Plaintiff has an

1 even likelihood of success on the merits. *Weygandt*, at 954. He is able to articulate the claims
2 *pro se* in light of the complexity of the legal issues involved. *Id.* His motion (Dkt. 214) should
3 be denied.

4 **ORDER**

5 It is **ORDERED** that:

- 6 • Plaintiff's Motion to Allow Disciplinary Hearings Program Administrator Michelle
7 Walker to Testify at Trial (Dkt. 215) **IS DENIED WITHOUT PREJUDICE**;
- 8 • Plaintiff's Motion to Request that the Defendants Appear by Video Teleconference for
9 Trial (Dkt. 214) **IS DENIED**; and
- 10 • Plaintiff's motion for appointment of counsel (Dkt. 214) **IS DENIED**.

11 The Clerk is further directed to send uncertified copies of this Order to all counsel of
12 record and to any party appearing *pro se* at said party's last known address.

13 Dated this 7th day of August, 2018.

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15 ROBERT J. BRYAN
16 United States District Judge